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Supreme Court of the United States

October Term, 1930.
No. 55

RAILWAY EXPRESS AGENCY, INCORPORATED, APPELLANT

vs.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION, APPELLEE

Appeal from the Supreme Court of Appeals of the State of Virginia

---

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

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BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

I.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Appeals of Virginia (R. p. 244)* is officially reported in 153 Va. 498. The unofficial citation is 150 S. E. 419.

II.

STATEMENT OF FACTS

Section 153 of the Constitution of Virginia, adopted in 1902, and found in the Code of Virginia, 1919, at page CLXXII, provides in part as follows:

> ". . . the term 'transportation company' shall include any . . . express company . . . ;"

and further:

> ". . . the term 'public service corporation' shall include all transportation . . . companies . . . ."

The appellant, Railway Express Agency, Incorporated, was chartered under the laws of the State of Delaware on December 7, 1928. By its certificate of incorporation (R. pp. 40-47) it is not only empowered to engage in intrastate, interstate and international express business by all known means of transportation, but it is also empowered "To own, construct, purchase, lease or otherwise acquire and to use, equip . . . and maintain railway cars, rolling stock and machinery of all kinds; also

*All references to the record are to the printed record. Italics are supplied by counesl except where otherwise stated.

wagons, trucks, motor vehicles, airplanes," etc.; also "ice houses, ice factories, refrigerating plants, warehouses . . . ; garages, stables, hangars," etc. It is further empowered to buy and hold personal property of all kinds "without restriction or limit as to amount"; to acquire and dispose of real property without limitation; to engage in any kind of manufacturing business; to acquire and deal in copyrights, etc.; and to acquire and deal in stocks, bonds, etc., of other corporations.

By paragraph 9 (R. p. 43) it is empowered:

> "To organize or cause to be organized . . . a corporation or corporations for the purpose of accomplishing any or all of the objects for which this corporation is organized . . ."

It is further empowered to purchase the business and to assume the obligations of other persons, firms or corporations, to manage or operate such business, and generally to carry on such lawful business as may seem to its Board of Directors "appropriate to be carried on in connection with the above purposes."

By the certificate of incorporation stock ownership is limited to railroad corporations; the "private property of the stockholders shall not be subject to the payment of the corporate debts to any extent whatever;" the Board of Directors is empowered to sell all the assets of the corporation, including its corporate franchise; and the right to amend is expressly reserved.

On January 25, 1929, appellant informally applied to the State Corporation Commission of Virginia for a certificate of authority to do business in Virginia in accordance with section 3847 of the Code of Virginia,

1919; this application was refused, and formal application was made on March 4, 1929 (R. pp. 115 *et seq.*, 217-218). This application also was refused by the State Corporation Commission (R. p. 216) and, an appeal being taken to the Supreme Court of Appeals of Virginia, the order of the Commission was approved (R. p. 254), without prejudice, however, to the right of appellant to engage in interstate business in Virginia.

The application of appellant was refused because of the provisions of section 163 of the Constitution of Virginia, adopted in 1902 and found in the Code of Virginia, 1919, at page XCI (R. pp. 245-246), the pertinent parts of which are as follows:

> "No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation . . . But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect . . ."

This clause was construed to prohibit the entrance into Virginia of any foreign public service corporation which had no line or route extending across the boundary of Virginia in 1902, when the Constitution went into effect, or which was not at that time engaged in lawful business within that Commonwealth; and it was accordingly adjudged that the appellant, neither having had such a line or route at that time, nor having been engaged at that

time in any lawful business therein, was not entitled to do an intrastate express business in Virginia (R. p. 248).

It was insisted before both the State Corporation Commission of Virginia and the Supreme Court of Appeals of Virginia that the appellant was simply a joint agency or facility of the railroads which as stockholders or otherwise were interested in it, and that a grant of authority to the Railway Express Agency, Incorporated, to do an intrastate business in Virginia, would be tantamount only to a grant of authority to those participating Virginia roads which already were authorized to do an intrastate business in Virginia (R. pp. 5, 8). It was further suggested that, as the appellant had purchased the property of the American Railway Express Company and had assumed the liabilities of that company, it was the successor of that company and, by virtue thereof, was entitled to the privilege possessed by that company of doing an intrastate express business in Virginia.

It was held first by the State Corporation Commission of Virginia and on appeal by the Supreme Court of Appeals of Virginia that the appellant was not such a joint agency or facility of the participating railroads as would entitle it to do an intrastate express business in Virginia, and that the appellant was not the successor of the American Railway Express Company in the sense that it acquired the privilege of that company to do an intrastate express business in Virginia.

Before the State Corporation Commission of Virginia and the Supreme Court of Appeals of Virginia it was argued that the Interstate Commerce Clause of the Federal Constitution required that a certificate of authority to do an intrastate business in Virginia be issued to the appellant; and before the Supreme Court of Appeals of

Virginia, though not before the State Corporation Commission, it was also argued that to refuse to issue such a certificate would be to deny to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution. Neither of these arguments was considered to have merit.

SUMMARY OF THE ARGUMENT

Point I. The questions before this court for determination:

The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia and the right of appellant as a "joint agency or instrumentality" of the several railroads, or as "successor" to the American Railway Express Company, to do an intrastate express business in Virginia are questions finally concluded.

The sole question here is whether the effect of the interpretation given violates any properly pleaded provision of the Federal Constitution.

Point II. The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia does no violence to the Commerce Clause of the Federal Constitution (Article I, section 8, paragraph 3), nor does that interpretation unlawfully burden the interstate commerce of the Railway Express Agency, Incorporated.

(a) The power of a State to exclude a corporation from doing business within its borders is limited by two conditions only: first, a State may not prevent the transaction of interstate business within its borders;

second, it may not exclude a corporation in the employ or under the control of the Federal government.

(b) That interpretation does not unduly burden interstate commerce.

Point III. The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia does not violate that provision of the Fourteenth Amendment to the Federal Constitution which prevents a State from denying to any person within its jurisdiction the equal protection of the laws.

(a) The benefits of that provision may be had by a foreign corporation only after permission to do an intrastate business has been granted.

(b) No attempt is made, either directly or indirectly, by contract or otherwise, to deprive the Railway Express Agency, Incorporated, of its right to institute suits in the Federal courts, or to remove suits from the State to the Federal Courts.

(c) That interpretation results in no unreasonable classification.

ARGUMENT

I.

The questions before this court for determination:

The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia and the right of appellant as a "joint agency or instrumentality" of the several railroads, or as "successor" to the American Rail-

way Express Company, to do an intrastate express business in Virginia are questions finally concluded.

The sole question here is whether the effect of the interpretation given violates any properly pleaded provision of the Federal Constitution.

The interpretation given to section 163 of the Virginia Constitution by the highest tribunal of that State is final and binding even on this court; the question here is whether that section as interpretated violates any provision of the Constitution of the United States, for here only the Federal question in a cause of this character can be considered.

In two recent decisions this court, speaking through the late Mr. Chief Justice Taft, has unqualifiedly adhered to this principle. In *Truax* v. *Corrigan*, 257 U. S. 312, it is said:

> ". . . this court is bound by the judgment of the State supreme court . . . in the construction which that court puts upon the statute."

And in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, it is said:

> "It is true that the interpretation put upon such a tax law of a State by its supreme court is binding upon this court as to its meaning, but it is not true that this court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. . . ."

The highest court of Virginia has so construed the pertinent section of the Constitution of Virginia as to prevent the appellant from engaging in intrastate commerce therein, even though the railroads over whose lines it would operate may engage in such commerce, and even though those railroads own a portion of its stock, or may receive a share of the profits earned by it, and even though it has entered into contracts with those roads and has purchased the physical properties of the American Railway Express Company.

The correctness of that construction cannot be questioned here, it can simply be inquired whether that construction contravenes one or the other of those portions of the Federal Constitution which the appellant invokes as its warrant for attempting to force itself into the field of domestic business in Virginia in the teeth of the fundamental law of that Commonwealth.

The appellant raises two and only two Federal questions. They are: an alleged conflict between section 163 of the State Constitution and Article I, section 8, paragraph 3, of the Federal Constitution; and an alleged conflict between that section of the State Constitution and that portion of the Fourteenth Amendment which assures to citizens the equal protection of the laws.

II.

The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia does no violence to the commerce clause of the Federal Constitution (Article I, section 8, paragraph 3), nor does that interpreta-

tion unlawfully burden the interstate commerce of the Railway Express Agency, Incorporated.

(a) The power of a State to exclude a corporation from doing business within its borders is limited by two conditions only: first, a State may not prevent the transaction of interstate business within its borders; second, it may not exclude a corporation in the employ or under the control of the Federal government.

In effect it is asserted by the appellant that because of the Commerce Clause of the Federal Constitution, if a foreign corporation has entered a State *vi et armis* of the Federal Constitution for the purpose of transacting an interstate business therein, the State is powerless to prevent that foreign corporation from doing a domestic business therein. If correct, the proposition as asserted cannot be restricted to those undertakings which are concerned with the transportation of goods and persons, but must of necessity apply to all business enterprises, for commerce is broader than the mere shipment of goods and transportation of passengers; it involves the innumerable and multifarious transactions of our present complicated business life. If the proposition asserted by the appellant be sound, that proposition applies not only to a corporation doing an interstate express business, but applies equally to an ordinary business corporation whose interstate operations fall under the protecting wings of the Federal Constitution, for as has been recognized by this court, the interstate business of merchant and trader is as much entitled to Federal protection as is that of our largest common carrier. *International Paper Co.* v. *Massachusetts*, 246 U. S. 135.

It is believed that such a proposition finds no foundation in the Federal Constitution; that it is subversive of those powers which are therein expressly reserved to the States, and that it destroys the right and power of a State adequately to regulate public service corporations doing a domestic business within its borders, or to determine the right of an ordinary foreign corporation to transact an intrastate business therein.

The proposition asserted by the appellant has nothing to do with the *right or power* of a State to impose conditions upon a foreign corporation for the *privilege* of transacting within its borders an intrastate business, nor is it concerned with the nature or validity of any restrictions imposed. It goes far beyond any proposition hitherto advanced and asserts that, if a corporation sees fit to avail itself of the *right* given by the Federal Constitution to transact an interstate business in any State, it thereby acquires the right to demand that it be given the *privilege* of doing an intrastate business. If the proposition be correct, the State no longer confers a privilege, for a privilege is that which may be either withheld or it may be granted. On this principle alleged by the appellant, when a corporation comes into a State and demands the right to do an intrastate business, the element of privilege is non-existent, for it comes not as one asking that a petition be granted, but it rather comes as one demanding that a right secured by higher law be recognized. In the latter sense, there comes into a State a corporation which is transacting a purely interstate business; it asks no privilege of the State; it demands by virtue of the Federal Constitution that the right thereby guaranteed be recognized. The very act of the Railway Express Agency, Incorporated, in requesting of the Commonwealth of Vir-

ginia that it be empowered to transact business therein, is a recognition of the power of that Commonwealth to grant or withhold some privilege which that corporation seeks. It is accepted by all parties and recognized by the highest tribunal of that Commonwealth that such a petition is not necessary for the transaction of interstate business. It, therefore, must be considered either that this corporation is engaged in a vain gesture of asking for the privilege of transacting intrastate business when it already had the right to do so, or else that the Commonwealth of Virginia has the right to grant or refuse that privilege as by its law may be determined.

That such a proposition as is asserted by the appellant is subversive of powers expressly reserved to the States, and is destructive of their right to deal with intrastate commerce, is evidenced by the following example. Many of the States require of one, who wishes to use motor vehicles for the transportation of goods and passengers in intrastate commerce, that he must first obtain a certificate of convenience and necessity for such transportation (see Virginia Acts of Assembly, 1930, page 894). In *Buck* v. *Kuykendall*, 267 U. S. 307, and in *Bush* v. *Maloy*, 267 U. S. 317, it was held that a State may not prevent a foreign motor vehicle carrier from entering the State and using its highways in interstate business. If the right to do interstate business carries with it the right to do intrastate business, any foreign corporation, which now or hereafter does, in and through any State, the business of an interstate motor vehicle carrier, may, despite the convenience and necessity of the people or localities, tear to pieces the policy of the State and its commerce and engage in domestic business therein.

Nor is it believed that the appellant has succeeded in founding its right to do an intrastate business in Virginia on any declaration of this Supreme Court. The cases cited by the appellant deal not with the right of a State to prohibit a foreign corporation, whether public service or otherwise, from doing an intrastate business, but those cases refer solely to the nature of the conditions which may be required of a foreign corporation which seeks to do a domestic business within a State and whether or not those conditions would demand of the foreign corporation a repudiation of the rights guaranteed by the Constitution of the United States. It is rather believed that the decisions of this highest tribunal have uniformly recognized the right and power of a State to exclude, as it sees fit, a foreign corporation from doing a domestic business within its borders.

The fundamental rights of a State in its dealing with a foreign corporation are thus laid down in *Paul* v. *Virginia*, 8 Wall, 168:

> ". . . The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. *They may exclude the foreign corporation*

> *entirely;* they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

It is frankly admitted that the quoted language would, on first consideration, appear to confer upon the States powers broader than are actually held by them. That case involved the right of a foreign insurance company to issue policies of insurance in another State. It was pointed out that these policies were not articles of commerce and the court was, therefore, concerned solely with the right of the corporation to do such a domestic business in a State other than that within which it was incorporated.

This broad, general statement quoted is, therefore, to be confined within the limits of the facts to which it applied. The right of a State *to impose conditions precedent* to the doing of a domestic business therein is limited in the sense that it may not require of a corporation that it resign Federal rights; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494; for instance, it cannot require that a foreign corporation give up its right to institute proceedings in the Federal courts, or to remove cases thereto; *Terral* v. *Burke Construction Co.*, 257 U. S. 529; or that it submit to taxation of property located beyond the jurisdiction of the State; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135; *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460. It is further admitted, and is hereinafter discussed,

that a State cannot impose as a condition precedent undue burdens or restrictions upon interstate commerce.

Nor is the right of a State *to exclude* a foreign corporation an absolute right. It was said in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, quoting from *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246, that—

> ". . . 'a State has the right to prohibit a foreign corporation from doing business within its borders, *unless such prohibition is so conditioned as to violate some provision of the Federal Constitution*' . . ."

A State accordingly may not prevent a corporation from engaging in interstate or foreign commerce; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; nor may it prevent a corporation in the employ or under the control of the Federal government from doing business within its borders; *Stockton* v. *Baltimore and New York Ry. Co.*, 32 Fed. 9; *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania*, 125 U. S. 181.

Beyond these limitations no decision of this tribunal has gone, and it is believed that the general principle asserted in *Paul* v. *Virginia*, *supra*, limited as above enumerated, accurately defines the power of a State and the right of a foreign corporation.

In this connection the appellant in his brief relies primarily upon the cases of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56, and *Ludwig* v. *Western Union Telegraph Co.* 216 U. S. 146. In addition to those, when the appellant was before the State Corporation Commission of Virginia, it

relied upon the cases of *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, and *Crutcher* v. *Kentucky*, 141 U. S. 47 (R. p. 232).

In the first two cases mentioned above the court was concerned with the effect on foreign corporations, which had long been legally doing business within the State, of an act which required that a fee of a certain per cent of the authorized capital of foreign corporations should be paid for the benefit of the State school fund. It was contended by the corporations that the requirement of such a fee "as a condition of its right to continue to do domestic business" was a burden on interstate commerce and unconstitutional. In neither of those cases was the court concerned with the right of a State to prohibit the doing of a domestic business therein; it was concerned solely with the right of a State to levy a tax upon capital representing as it did property within and without the State as a condition precedent to the *continuation* of the transaction of intrastate business.

Ample evidence that this was the question in *Western Union Telegraph Co.* v. *Kansas, supra,* is found in the following quotation:

> "Whatever may be the extent of the State's authority over intrastate business, was it competent for the State to require that the telegraph company —which surely had the right to enter and remain in the State for interstate business—as a *condition of its right to continue doing domestic business in Kansas* should pay, in the form of a fee, a specified per cent of its capital stock . . . ?"

And elsewhere therein it is said:

> ". . . It is important here to observe—indeed, the contrary could not be asserted—that the Telegraph Company lawfully entered Kansas, with the consent of both the Territory and State, for the purposes of its business of every kind long before, and was legally there when, the Bush Act was passed. . ."

In *Pullman Co.* v. *Kansas, supra,* it is emphasized that—

> "The Pullman Company is admittedly engaged, as it has been continuously for many years, in commerce among all the States of the Union, as well as in intrastate business in Kansas. . . ."

In support of his position the appellant also relies upon *Ludwig* v. *Western Union Telegraph Co., supra.* The Act of Arkansas there involved was closely similar to that of Kansas just considered, with the exception that the Arkansas Act made no attempt to distinguish between interstate commerce and intrastate commerce. On the authority of *Western Union Telegraph Co.* v. *Kansas, supra,* this court held that, even if such a distinction were read into the statute, the act would still be void. Here also great stress is laid upon the fact that for many years the company had been doing a local business in the State with the State's permission and acquiescence.

In the two Kansas cases above mentioned, Mr. Justice White filed an opinion concurring in the result reached by the four justices who approved the majority opinion. In his concurring opinion in *Western Union Telegraph Co.*

v. *Kansas, supra,* while agreeing with the conclusions and reasoning of the majority opinion, he relies upon the fact that for many years the company had been engaged in a lawful domestic business within Kansas and that to require of it further that it pay a per cent of its authorized capital in order to continue that business was to deprive it of its property without due process of law.

The only expression which can be found in the records of the Supreme Court of the United States supporting the sweeping claim of the appellant is in Mr. Justice White's concurring opinion in *Pullman Co.* v. *Kansas, supra.* As quoted on page 9 of the brief for appellant, he points out that the State has no absolute power to exclude a corporation, but that its power is only relative, and he further says:

> ". . . Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the State, a State law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business, would be a direct burden upon interstate commerce and in conflict with the principles stated in proposition 1. . . ."

No other justice of this court concurred in this statement of Mr. Justice White's. This isolated quotation is in the teeth of his former opinion in *Ashley* v. *Ryan,* 153 U. S. 436, to which reference will hereafter be made. In the case of *Pullman Co.* v. *Kansas, supra,* Mr. Justice Holmes dissented, together with Mr. Chief Justice Fuller and Mr. Justice McKenna. In that dissent reference is

made to this sweeping statement of Mr. Justice White's as follows:

> ". . . I do not see how or why the right of a State to exclude a corporation from internal traffic is complicated or affected in any way by the fact that the corporation has a right to come in for another purpose. It is said that in such a case the power of the State is only relative, and in the sense that it is confined to the local business, I agree, But in the sense that it is not absolute over that local business the statement seems to me merely to beg the question that is to be discussed. . . ."

In the case of *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, the only question involved was the power of the State of Florida to grant to the Pensacola Company, a Florida corporation, the exclusive right to construct telegraph lines in two counties in Florida to the exclusion of the Western Union Company, a foreign corporation engaged in interstate commerce, when the Western Union Company had secured by contract with a railroad company the right to construct its lines along the right of way of that railroad company. It was held that Florida could not prohibit the Western Union Company from constructing its lines so long as that company did not need to invoke the power of condemnation to construct those lines. But no reference whatsoever is made to the question whether Florida could prohibit the Western Union Company from doing an intrastate business.

The court very strongly relied upon the Act of Congress approved July 24, 1866, entitled, "An Act to aid

in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," the effect of which is thus stated by the court:

> ". . . It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.
>
> . . . . . .
>
> "No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

The last case relied upon by the appellant is *Crutcher* v. *Kentucky*, 141 U. S. 47. The question there involved was whether a statute of Kentucky, which statute required a person who was an agent of a foreign express company admitted to the State to do both an interstate and intrastate business to take out a license to act as the agent of such company in the doing of *all* its business, was a violation of the Federal Consitution. Because the Kentucky statute made no distinction between interstate and intrastate commerce and, in effect, required of an agent engaged in interstate commerce that he take out a State license, the statute was held to be unconstitutional.

So much for the cases relied upon by the appellant. On the other hand, this court has repeatedly asserted the

power of a State to prohibit a foreign corporation from doing a domestic business within its borders.

In *Relfe* v. *Rundle,* 103 U. S. 222, the court, speaking through Mr. Chief Justice Waite, said:

> ". . . No State need allow the corporations of other States to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations . . . ."

In *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania,* 125 U. S. 181, the court, after reviewing the earlier authorities, says:

> ". . . The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them,

such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. . .

"*The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign.* The control of such commerce, being in the Federal government is not to be restricted by State authority."

In *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, the court, after reviewing numerous authorities, says in no uncertain terms that a State has the power to exclude a corporation, but that from this language it is not to be implied that the State can prevent a foreign corporation from transacting within its borders commerce between that State and other States.

In *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, it is laid down as an established principle of law that a State has the right to exclude a foreign corporation from doing business within its borders, subject to the limitations which have hereinbefore been mentioned.

In *Ashley* v. *Ryan, supra*, it is true that the court was primarily concerned with the power of the State of Ohio to determine upon what conditions the laws of Ohio touching consolidation of corporations might be availed of. It was there contended on behalf of railroads seeking to consolidate that the conditions required by Ohio violated the Commerce Clause of the Federal Constitution.

The contention made is closely analogous to that made in the instant case. In the *Ashley Case* an Ohio corporation, and corporations of other States engaged in interstate commerce, desired to consolidate under the Ohio law, and it was argued that the conditions prescribed by the Ohio law were violative of the Federal Constitution. There was no question touching the right to engage in interstate commerce. In the instant case the appellant is seeking to do an intrastate business in Virginia and it is said that a provision of the State Constitution, allowing only domestic corporations to do an intrastate express business, is violative of the Commerce Clause of the Federal Constitution. This Virginia law involves no question of a right to do interstate commerce. In the *Ashley Case* it is said:

> ". . . As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisites to corporate life. . . ."

In *Hemphill* v. *Orloff*, 277 U. S. 537, it is said:

> "It is settled doctrine that a corporation organized under the laws of one State may not carry on local business within another without the latter's permission, either express or implied. . . ."

Perhaps no other decision of this court so clearly indicates the right of a State to exclude a foreign corporation from doing a domestic business therein, even though

it is already doing an interstate business, as does that of *Herndon* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 135. An Arkansas statute provided that all trains should stop at junction points to admit and discharge passengers, and another statute provided that, if a foreign corporation removed a case to a Federal court or brought suit in a Federal court, its license should be revoked. The railroad company brought suit in a Federal court to enjoin the enforcement of the first mentioned statute, and likewise to enjoin the enforcement of the last mentioned statute. In both respects the railroad company was successful. In the discussion of the second question involved in the *Herndon Case* this court expressly indicated that a State would have the right to exclude a foreign corporation from doing a domestic business within its borders, even though that corporation were doing an interstate business therein, for it says:

> ". . . Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. . . . In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that *while the right to do local business within the State may not have been derived from the Federal Constitution*, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof."

The appellant in his brief points out that some of these cases cited are cases of corporations engaged in ordinary

business and not engaged in interstate or foreign commerce. But in this last cited case, one which is strongly relied upon by the appellant, this court makes it clear that, while a State may not revoke the license of an interstate railroad to do an intrastate business within its borders because it resorts to a Federal court, that right of resort being assured by the fundamental law, nevertheless, the fundamental Federal law gives to a foreign corporation no right to demand of a State that it be permitted to do a local business therein.

(b) That interpretation does not unduly burden interstate commerce.

The appellant argues that the construction placed on section 163 of the Constitution of Virginia by the Supreme Court of Appeals of that Commonwealth burdens interstate commerce in two respects: first, the appellant says that not only the convenience of the people, but also the convenience of the express company itself, demand that both interstate and local business be carried on by the same agency; that the organization of a Virginia corporation for the purpose of conducting the intrastate business is not a solution to this difficulty; and, further, that, if it were found advisable to obviate the difficulty of keeping two sets of books and two sets of records by consolidating the subsidiary corporation with the parent corporation, the Railway Express Agency, Incorporated, would then become a domestic corporation of both Delaware and Virginia and subject to the laws of both; second, the appellant argues that the effect of excluding the Railway Express Agency, Incorporated, from doing a domestic business in Virginia burdens interstate com-

merce in a fashion analogous to the burden imposed by a discrepancy between intrastate and interstate rates.

It cannot be conceived that any requirement imposed by a State on a corporation engaged in interstate and intrastate business will not have some remote effect on the interstate business of that corporation. Even the simplest form of license fee takes from the treasury of the corporation money which might be used in interstate commerce, but such requirement is not regarded as a burden on interstate commerce. Only that requirement which operates as an actual burden upon the interstate business of a corporation and as a hinderance to that corporation is regarded as unconstitutional and void.

The Railway Express Agency, Incorporated, has no inherent right to demand that the Commonwealth of Virginia permit it to do a domestic business therein certainly, if it do no such business, the Commonwealth of Virginia neither has the right nor does it seek to require anything of it for doing an interstate business therein; and it is not to be conceived that a State, which attempts to impose no conditions for the privilege of doing a domestic business, but simply says that no domestic business shall be done, can possibly be burdening interstate commerce. A burden presupposes some active requirement or regulation by a State of a corporation that seeks to do business within its borders. Here Virginia simply says that it will not permit a new foreign public service corporation to do any domestic business within her borders. It is not necessary to consider whether the convenience of those who engage in intrastate commerce will thereby be hampered, for no right under the Federal Constitution in relation thereto is secured to any person, and it will be time enough to consider that question when some shipper

raises it. *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 484. This agency, from which the State demands nothing, cannot raise the question that it would be more convenient for domestic shippers if it were given a certificate of authority to do domestic business, nor can it raise the objection that its interstate commerce is burdened when its sole objection to the policy of Virginia is found in the refusal of that State to prescribe conditions under which the Agency may carry on an intrastate business. Under no conditions can this corporation, as it now exists, do a domestic business in Virginia. It can become active in organizing a subsidiary and through that subsidiary domestic business in Virginia can be done, either separately or by consolidation; but the Railway Express Agency, Incorporated, *as it now exists,* cannot do a domestic business in that Commonwealth.

All the cases relied upon by the appellant bear out this theory. The taxes imposed by the States of Kansas and Arkansas in the statutes involved in *Western Union Telegraph Co.* v. *Kansas, supra; Pullman Co.* v. *Kansas, supra, and Ludwig* v. *Western Union Telegraph Co., supra,* all affected property outside of the State, used in interstate commerce, and were considered to burden that commerce. But there the State tried to exact something from the instrumentalities of interstate commerce as a price for conducting intrastate commerce. Here the State refuses to exact anything.

The extent of Federal regulation over intrastate commerce is not coextensive with that commerce; Federal regulation is not to be exercised in cases in which a State discriminates in favor of interstate commerce and against intrastate commerce; it is to be exercised only to prevent the enforcement of such State regulations as either dis-

criminate against interstate commerce, or actively operate to prevent the carrying into effect of Federal laws. For instance, in *Baltimore and Ohio Railroad Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, it was held that the Act of Congress, regulating the hours of service of interstate employees, could not be frustrated by the fact that those employees were engaged in both interstate and intrastate commerce. In *Southern Ry. Co.* v. *United States,* 222 U. S. 20, it was held that the amendment to the safety-appliance act was valid, even though its provisions were not confined to vehicles in interstate commerce, for the reason that both classes of traffic are moved in the same trains and the safety of interstate traffic is augmented by the use of the safety appliances on intrastate cars. In the *Employers' Liability Cases,* 207 U. S. 463, an Act of Congress regulating the liability of a railroad to its employees, whether State or interstate, was held unconstitutional, but in the *Second Employers' Liability Cases,* 223 U. S. 1, it was held that Congress could regulate the liability of a railroad to an interstate employee, even though he was injured by an intrastate employee.

This principle of the extent to which intrastate commerce is subject to the Federal law is fully borne out by the rate cases. In the first of those, the *Shreveport Case* (*Houston, East & West Texas Ry. Co.* v. *United States,* 234 U. S. 343), it was held that, if by the use of intrastate rates preference was given to certain persons and localities, those rates unjustly discriminated against interstate commerce. It was also held that, so far, but only so far, as State rates discriminated against persons and localities, they were void.

Subsequently, the Transportation Act of 1920, 41 Stat.

474, *et seq.*, was enacted. By its provisions the Interstate Commerce Commission was given the power to remove "any undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce" (section 13, paragraph 4); and in section 15a, paragraphs 2 and 3, the Commission was directed to regulate rates so as to assure an annual net railway operating income equal to a certain return upon "the aggregate value of the railway property." As a consequence, it was held in *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, that a State not only was powerless to prescribe intrastate rates which, as to persons and localities, discriminated against interstate commerce, but that it was also powerless to prescribe rates which in no sense discriminated against persons and localities, but which rates were placed at so low a figure that of necessity interstate rates would have to be raised in order that the railroad might realize the determined profit, and it was therein said:

> ". . . Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing State work. The affirmative power of Congress in developing interstate commerce agencies is clear. . . . In such development, *it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce* it deems necessary or desirable. . . ."

It is to be noted that, pursuant to this language, a State is restricted only in the use it makes of the interstate carriers for intrastate commerce. This is far from supporting the view that the interstate carrier may compel the State to make use of it in intrastate commerce.

The *Minnesota Rate Cases,* 230 U. S. 352, are approved in the Wisconsin case as follows:

> ". . . '. . . This is not to say that the nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. . .' . . ."

These provisions of the Transportation Act, assuring to the railroads a certain net operating income, were determinative of the decision in *Colorado* v. *United States,* 271 U. S. 153, wherein it was held that the Interstate Commerce Commission had authority to authorize the abandonment by an interstate carrier of a branch line lying wholly within the State of Colorado, and it was pointed out that, if a State could compel an interstate carrier to operate at a loss a branch line within the borders of that State, interstate commerce would have to assist in making up the loss and would thereby be burdened.

It will be noted that these cases deal with the efforts of a State to regulate the intrastate business of a foreign corporation in such a way as to discriminate against persons and localities in interstate commerce, or in such a

way as to necessitate higher interstate commerce rates. Such efforts have been held to be unconstitutional; but here the State of Virginia attempts to impose no regulation at all on the Railway Express Agency, Incorporated. It is nowhere indicated that a foreign corporation must be allowed to do an intrastate business so that interstate business may profit thereby. It is further to be noted that these cases rest on the assurance of a certain net operating income. Such assurance, however, is confined solely to railway companies.

III.

The interpretation given by the Supreme Court of Appeals of Virginia to section 163 of the Constitution of Virginia does not violate that provision of the Fourteenth Amendment to the Federal Constitution which prevents a State from denying to any person within its jurisdiction the equal protection of the laws.

(a) The benefits of that provision may be had by a foreign corporation only after permission to do an intrastate business has been granted.

In *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, it was said that "equal protection of the laws means subjection to equal laws, applying alike to all in the same situation." It is, therefore, evident that, as a foreign corporation is not subject to the laws of a State until it has domesticated, no foreign corporation falls within the protection of this provision until that corporation has been granted authority to do business within the State.

In the case just cited the court was concerned with an act of the State of Alabama which imposed a tax upon foreign corporations, based on the amount of capital stock employed by them in the State, while a similar tax was not imposed upon domestic corporations. It was held that such a tax was unconstitutional in that it violated that portion of the Fourteenth Amendment referring to the equal protection of the laws. The court took occasion to speak as follows:

> "The argument on the part of the State of Alabama places much weight upon the cases in this court *which have sustained the right of the State to exclude a foreign corporation from its borders,* and to impose conditions upon the entry of such corporations into the State for the purpose of carrying on business therein. . . . It is sufficient for the present purpose to say that *we are not dealing with a corporation seeking admission* to the State of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that State . . . ."

Subsequently, this suggestion was fully developed and carried to its ultimate conclusion in the case of *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494, wherein it is said:

> ". . . With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State and any inequality as between the foreign corporation and

> the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; *but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.*"

The Commonwealth of Virginia seeks not to place on a different basis a foreign express company which is lawfully doing an intrastate business in Virginia from that on which it places a domestic express company. It says to the newly organized foreign express company that it shall not enter, and, under the Fourteenth Amendment to the Constitution of the United States, the foreign express company, which is not entitled to the privileges and immunities of the citizens of the several States (*Pembina Con. Silver Mining Co.* v. *Pennsylvania, supra; Paul* v. *Virginia, supra*), is not deprived of the protection of any law of the Commonwealth of Virginia, the benefits of which it has the right to seek.

(b) No attempt is made, either directly or indirectly, by contract or otherwise, to deprive the Railway Express Agency, Incorporated, of its right to institute suits in the Federal courts, or to remove suits from the State to the Federal courts.

The appellant goes to great length in arguing the proposition, which for all time has been settled in *Terral* v. *Burke Construction Co.*, 257 U. S. 529, that a State cannot, as a condition precedent to the issuance of a license to a foreign corporation to do an intrastate business within its borders, demand that the foreign corporation give up its right of resort to the Federal courts; nor can

it, after the corporation has been domesticated, revoke the license because the corporation avails itself of this right secured by the Federal Constitution.

The Commonwealth of Virginia is unable to perceive the pertinence to the instant case of this settled principle of constitutional law. It does not seek to force the appellant to give up this right as a condition of bestowing upon it the privilege of doing a domestic business within Virginia. It says to the appellant that under no conditions can it do a domestic business within Virginia. The appellant, if it sees fit, may avoid the field of Virginia intrastate business, or it may organize a Virginia subsidiary and that Virginia subsidiary may do business therein, but, if the appellant so elects to do, it may still avail itself of the right, so far as any statute in Virginia is concerned, to institute suits in the Federal courts, or to remove cases thereto. If the appellant thereafter should consolidate with its Virginia subsidiary, that new consolidated company could not institute or so remove suits, but that new consolidated company will not be the appellant. It will be in part a creature of Virginia and a domestic corporation thereof, for its very existence will be founded upon the action of the Commonwealth of Virginia in creating it.

(c) That interpretation results in no unreasonable classification.

It is sought to argue that, since in 1918 the American Railway Express Company, a foreign corporation, was granted a certificate to do an intrastate business in Virginia, and since in 1921 the Southeastern Express Company, an Alabamian corporation, was granted such a cer-

tificate, it is now a violation of the Federal Constitution for Virginia to withhold such a certificate from the Railway Express Agency, Incorporated. It was pointed out by Mr. Epes, Chairman of the State Corporation Commission of Virginia, in his opinion (R. pp. 229-230) that the Commission gave no reason for allowing the certificate to the American Railway Express Company and for altering the view it held in 1914 when it refused a similar application from Wells, Fargo and Company; but it may well be that his suggestion that the reason of the Commission in so allowing the certificate on July 26, 1918, was that on that date the Director General of Railroads was operating the American Railway Express Company as a Federal agency.

The State Corporation Commission took the view in 1921, when a certificate was given to the Southeastern Express Company, that the State of Virginia was compelled, despite its constitutional provision, to allow a foreign interstate commerce carrier to do an intrastate business. As was pointed out by the Supreme Court of Appeals of Virginia in its decision in this case found in 153 Va. 498, and found on pages 244-253 of the record, the Corporation Commission erred and "erroneously granted the certificate of authority."

It is a novel doctrine that a lower judicial body, having erred in one instance, is thereafter for all time forced to fly in the face of the fundamental law governing it and violate that law at the demand of a foreign corporation which has no right in the premises to do an intrastate business within the State. And it is an even more novel doctrine that a lower tribunal by its error in one case can bind an appellate tribunal in all similar cases which may thereafter be brought to that higher body. The doc-

trine of *stare decisus* is not to be used as a lever to perpetuate error. This court so held when, in *Terral* v. *Burke Construction Co.*, *supra*, it reversed the doctrine announced in *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246. Surely the Commonwealth of Virginia is not to be bound for all time and in other similar instances when on one occasion its Corporation Commission has erred.

CONCLUSION

That other States have granted to the appellant the right to do an intrastate business within their borders, that the appellant will do many millions of dollars worth of business, and that Virginia intrastate express business is a relatively small matter, are considerations of no importance in the determination of the question involved. The question is solely whether a State may determine what artificial creatures may engage in a domestic business within its borders. Heretofore the right of a State to so determine has been unquestioned. Its sovereignty over its internal concerns, a sovereignty to be exercised as it sees fit within the limits of the Federal Constitution, entitles it to the unrestrained exercise of the course its people have determined to be advisable.

Respectfully submitted,

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